

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

GARY A. BROWN)	
Claimant)	
VS.)	
)	
WAL-MART)	Docket No. 1,005,445
Respondent)	
AND)	
)	
AMERICAN HOME ASSURANCE CO.)	
Insurance Carrier)	

ORDER

Claimant appeals the October 22, 2002 preliminary hearing Order entered by Administrative Law (ALJ) Judge Bruce E. Moore.

ISSUES

In his Form K-WC-E-1 Application for Hearing filed August 7, 2000, claimant alleges he injured his back at work, "On or about 1-3-02 and each and every day worked thereafter." But at the preliminary hearing claimant's counsel announced that claimant was not alleging an aggravation after January 3, 2002. It was explained that a series of accidents was alleged because he was unsure of the date of the specific accident and injury. ¹ In claimant's brief to the Board, however, he again alleges a series of aggravations. ²

¹ P.H. Trans. at 5 and 22.

² Claimant's letter brief dated Dec. 9, 2002, at 4-5.

Judge Moore denied claimant's request for benefits finding "claimant has failed to sustain his burden of proof of personal injury by accident arising out of and/or in the course of employment with Respondent. "Claimant acknowledged, in writing, in his exit interview that he injured his back 'working on his car'." ³

Claimant contends the ALJ erred in that the greater weight of the credible evidence supports a finding that he suffered personal injury by a series of accidents that arose out of and in the course of his employment with respondent. Conversely, respondent contends the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

At the time of his alleged accident in January 2002, claimant was working with restrictions from a prior work-related back injury. Claimant had settled his prior claim for a February 17, 2000 injury on a running award based upon an eight percent permanent partial impairment rating. Future medical was left open. His back continued to be symptomatic and caused claimant difficulty in performing his job. The case at bar alleges a specific event occurring on or about January 3, 2002, but also alleges an aggravation of the prior back injury through a series of accidents each and every working day thereafter. Interestingly, claimant testified to aggravations and incidents of worsening before January 2002, including a job change to lighter duty in December 2001, but did not describe any specific work-related worsening after the alleged January 3, 2002 incident.

The evidence is contradictory and there is considerable dispute about the cause of claimant's recent worsening. Claimant points to an alleged incident at work on January 3, 2002, while mopping under a table. Conversely, respondent contends claimant returned to work on January 6, 2002, and attributed his symptoms to working on his personal vehicle over the weekend. Jim Terrill, claimant's supervisor, acknowledged there were times he had to adjust claimant's work tasks because claimant's back was bothering him. Mr. Terrill also recalled times claimant had to leave work early before January 6, 2002 because his back was bothering him. But Mr. Terrill did not recall that January 3, 2002 had been one of those times. Mr. Terrill did recall, however, that on January 6, 2002 claimant ". . . stated very clearly to me that he'd worked on his van and it strained his back." ⁴ Claimant was unable to complete his entire work shift on January 6 and missed two more days of work on January 7 and 8, 2002. He returned to work but was eventually terminated

³ Order dated Oct. 22, 2002.

⁴ Terrill Depo at 25.

due to poor attendance. January 17, 2002 was either the last day claimant worked or his date of termination.⁵

The Board finds that even if claimant injured his back at work on January 3 as alleged, he thereafter suffered a non work-related aggravation. And the evidence does not establish a subsequent work-related worsening. Accordingly, claimant has failed to prove that his current need for preliminary hearing benefits is directly traceable to his work with respondent. The ALJ's Order denying benefits should be affirmed.

WHEREFORE, the Appeals Board affirms the October 22, 2002 preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore.

IT IS SO ORDERED.

Dated this _____ February 2003.

BOARD MEMBER

c: Andrew L. Oswald, Attorney for Claimant
Kendall R. Cunningham, Attorney for Respondent
Bruce E. Moore, Administrative Law Judge
Director, Division of Workers Compensation

⁵ The dates of January 15 and January 18, 2002 are also mentioned as claimant's last working day. See P.H. Trans. at 5; Claimant's letter brief dated Dec. 9, 2002, at 5.